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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND CALDERON, Defendant and Appellant.	B206734 (Los Angeles County Super. Ct. No. ZM009675)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

In December 2003 and January 2006, the Los Angeles County District Attorney's Office filed petitions seeking defendant Raymond Calderon's recommitment as a Sexually Violent Predator (SVP) under Welfare and Institutions Code section 6600, et seq.[1] He had initially been committed as an SVP in February 2002. Following a joint probable cause hearing on the petitions, at which the court determined probable cause existed, the petitions were consolidated for jury trial. The parties stipulated that any recommitment would be for a single two-year term. The jury found the allegations of the consolidated petitions true, and the court entered judgment ordering defendant's recommitment as an SVP for two years. Defendant appeals, and contends that the evidence is insufficient to support his recommitment, because it failed to prove that he posed a danger to the health and safety of others at the time of his commitment. We affirm.

EVIDENCE AT TRIAL

A. *Prosecution Evidence*

A finding that a person is an SVP requires proof that the person (1) has been convicted of a statutorily listed "sexually violent offense against one or more victims," (2) "has a diagnosed mental disorder that makes the person a danger to the health and safety of others," and (3) is likely to "engage in sexually violent criminal behavior" (§ 6600, subd. (a)(1)) which is (4) is "predatory" in nature, meaning "directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization" (§ 6600, subd. (e)). (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 243.)

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[1] All undesignated statutory references are to the Welfare and Institutions Code.

At trial here, although no formal stipulation appears in the record, the defense did not dispute that defendant had been convicted of a predicate sexually violent offense against one or more victims.[2] The evidence thus focused on the latter three factors.

The prosecution relied on the testimony of Drs. Jack Vognsen and Dawn Starr, both of whom are clinical psychologists on the panel of SVP evaluators under contract with the California Department of Mental Health. Both experts independently evaluated defendant in September 2003, October 2005, and July 2007. They did not consult with one another in their evaluations.

1. *Qualifying Crimes and Custodial Behavior*

Defendant committed his predicate sexually violent offenses in 1981. Before then, he had an extensive history of relatively minor, nonviolent offenses. He also reported that as a child he was physically and sexually abused.

Both Drs. Vognsen and Starr described defendant's prior sexually violent offenses and his behavior in custody. The prior violent sex offenses occurred over two days in December 1981. In the first crime, defendant approached a 16-year-old girl from behind on the street, held a knife to her neck, pulled her into a carport, and raped her. The next day, he approached another 16-year-old girl from behind on the street, threatened her with a knife, and pulled her into an alleyway.

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[2] In his opening statement, the prosecutor stated that the jury would not be required to determine whether defendant had "been convicted of qualifying offenses. . . . [T]hat particular element is going to be one of the three elements that you are not going to have to decide. The reason for that is those have already been determined to be true. We have agreed upon that. That has been taken away from you. . . . It is a fact that he has been convicted of the qualifying crimes." In her opening statement, defense counsel stated that the prosecutor was "right in the sense that [defendant] has been convicted of prerequisite sexual offenses."

The victim was cut on the hand when she resisted. Defendant ordered her to orally copulate him and then raped her. Later that day, after following a 27-year-old woman to a fast food restaurant, defendant accosted her as she emerged from the restroom and tried to force her back inside. When she screamed, he fled.[3]

Defendant was sentenced to 15 years in state prison, but was committed to Patton State Hospital under former law as a mentally disordered sex offender. At Patton, he failed to participate productively in rehabilitation, and frequently masturbated in front of female staff members. In 1984, while confined at Patton, defendant committed an attempted sexual assault on a female staff member. When the staff member rebuffed defendant's advances, he put a jacket over her head and pulled her into a bathroom. She screamed and the attack ended. As a result of the crime, defendant was found not amenable to treatment at Patton, and he was committed to prison.

At state prison, defendant continued to expose himself and masturbate in front of female personnel, the last incident occurring in 1999. At one point while in prison, he slapped a female staff member so hard that she lost her balance. In another incident, in 1986, he stabbed a male correctional officer with a prison-made weapon.

According to Dr. Starr, who had done more than a thousand SVP evaluations and had evaluated more than a thousand other convicted sex offenders, defendant had more incidents of sexual misconduct than she had ever seen. Some of defendant's comments about these incidents suggested that he believed that he could not control himself, had a mental disorder, and was sexually interested in

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[3] Defendant was convicted of two counts of forcible rape (Pen. Code, § 261, subd. (2)) arising from the first two incidents. He was not convicted of any crime in the third incident.

staff members. In 1985, he approached a female psychological technician and told her he was attracted to her. Following one incident of masturbation in September 1993, he said at his disciplinary hearing that he could not control himself. After a later such incident during the same month, he said, "The officer excited me so I just did it." After still another incident that month, he admitted putting his hand on a correctional officer, and said that as long as he was on medication he thought he would "be all right but [couldn't] really say."

Since 2002, defendant had been incarcerated at a state mental hospital, first at Atascadero, and since 2006, at Coalinga. In that time, his behavior had improved and he had no reported incidents of exhibitionism or masturbation, thus evidencing some capacity to control his behavior. However, he continued to make comments suggesting sexual interest in female staff members. In June 2005, in apologizing to a female psychiatric technician student for a comment, defendant said, "I have been here 25 years, I will always have a special place in my heart for you. . . . When I got on this unit and I made eye contact, I thought we had something. I hoped when I got out, that we could have something together." In September 2005, he told a female psychiatric technician that, among other things, he had "tried really hard not to stare at [her] all day."

When interviewed by Dr. Vognsen in 2005 and 2007, defendant admitted committing the 1981 offenses. He stated that he committed the crimes because he was abusing drugs and had broken up with his girlfriend. He said that he felt remorse, because he himself was sexually assaulted in prison and understood what the victims must have felt. He also complained that no one understood the hardships that led him to commit the crimes and that no one had taken him "seriously and given . . . the kindness or understanding" he deserved.

Regarding his stay at Patton, defendant said that he received no treatment and simply played cards for two years. He explained that he masturbated in front

of female staff members because some women like it. He claimed that some female staff would bend over and open their legs when he passed by. He had had strong urges to masturbate, and would do so over long periods, causing his genitals to become sore. He also said that he no longer engaged in such behavior.

As to the incident in prison in which he stabbed a correctional officer, defendant said that the officer had been persecuting him because defendant was classified as a sex offender. Defendant stabbed the officer with a roll of newspaper and merely inflicted a bruise.

2. *Current Diagnosed Mental Disorder*

Referring to the Diagnostic Statistical Manual of Mental Disorders, 4th Edition, Text Revision (DSM-IV), both Drs. Vognsen and Starr diagnosed defendant as suffering from two primary mental disorders: "paraphilia not otherwise specified" (referred to a "paraphilia n.o.s.") and personality change due to head injury.[4]

a. *Paraphilia N.O.S.*

As defined in DSM-IV, the essential features of paraphilia n.o.s., as relevant to defendant's diagnosis, are "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving . . . other nonconsenting persons that occur over a period of at least six months." Drs. Vognsen and Starr believed that defendant fit this diagnosis, because he had engaged in sexual behavior with non consenting females in the 1981 forcible sex offenses offenses, in the 1984 attack

[4] Both doctors also believed that defendant suffered from the contributory disorders of exhibitionism, polysubstance dependence, and antisocial personality disorder.

on the female staff member at Patton, and in his exhibitionism and masturbation while in custody.

Drs. Vognsen and Starr admitted that there was debate in the psychological and psychiatric community concerning the applicability of a diagnosis of paraphilia to the crime of forcible rape.[5] Both Drs. Vognsen and Starr believed, however, that the repeated commission of a forcible sex crime such as rape over a period greater than six months qualified as evidence of paraphilia, because the victim was nonconsenting, and the repeated act of committing the crime was circumstantial evidence that recurring fantasies or urges motivated the repeated behavior.

b. *Personality Change Due to Head Injury*

In 1979, defendant suffered a serious head injury when struck in the head by the butt of a shotgun. Both Drs. Vognsen and Starr concluded that defendant suffered a personality change due to head injury. A year and a half after the injury, his behavior became more aggressive, as evidenced by the 1981 crimes. The brain

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[5] Defense counsel cross-examined Drs. Vognsen and Starr by referring to a deposition given by Dr. Michael First, the editor of DSM-IV. According to Dr. First's deposition testimony, in referring to the element of sexual behavior involving "other nonconsenting persons," DSM-IV did not intend to include rape (even though the rape victim was nonconsenting). Rather, it was meant to refer to other, less offensive types of sexual behavior such as indecent exposure and voyeurism. Further, the literal language of DSM-IV, which defined paraphilia in part as aberrant "sexually arousing fantasies, sexual urges, *or* behaviors" could be read as permitting a paraphilia diagnosis based solely on aberrant sexual behavior. (Italics added.) Dr. First testified in his deposition, however, that a diagnosis of paraphilia requires not just aberrant sexual behavior, but also fantasies or sexual urges. As pointed out by both Drs. Vognsen and Starr, Dr. First did not testify that rape cannot be categorized as sexual behavior tending to show paraphilia. Rather, he meant that for a diagnosis of paraphilia to be made, rape must be accompanied by sexual fantasies or urges.

injury was likely a factor, combined with defendant's other conditions, in causing him to commit the offenses.

c. *Danger to Others*

Both psychologists believed that defendant's mental disorders made him a danger to the health and safety of others. Dr. Vognsen found particularly telling defendant's 2005 explanation for his masturbatory behavior. Despite being incarcerated for rape and being sanctioned at Patton and in prison for masturbating in front of female staff members, he still maintained that some women enjoyed witnessing that behavior.

According to Dr. Starr, defendant's crimes, custody behavior, and comments revealed a feeling that women are "kind of sexual creatures who are . . . frustrating and kind of interested," while at the same time a feeling that was "very hostile and derogatory towards females." In Dr. Starr's opinion, such attitudes are a risk factor in predicting recidivism.

Defendant was currently 51 years old, and the frequency of his acting out had decreased over the years. Neither expert, however, found that fact particularly significant in determining whether defendant's mental disorders made him a danger. As Dr. Vognsen explained, since 2002, defendant had been in a supportive environment at Atascadero and Coalinga State Hospitals. That setting lacked the stimuli for the type of sexual arousal or anger defendant experienced in a prison setting. However, sexual deviancy is an imbedded disorder. Given the right conditions, defendant's sexually deviant urges could easily appear again. Defendant had refused to permit an examination to determine whether he would still respond to deviant sexual stimuli. In Dr. Vognsen's opinion, defendant still suffered from a current diagnosed mental disorder that made him a danger to the health and safety of others. Dr. Vognsen did not know if defendant suffered from

current urges, but believed that the underlying structure giving rise to the urges was still intact and that the urges would be activated in the right conditions.

Similarly, Dr. Starr conceded that since being placed in a state hospital in 2002, defendant had not had any documented incidents of masturbation, though there had been incidents in which he verbally crossed boundaries with female staff. Defendant had shown himself better able to control himself while incarcerated in the state hospital, but the diagnosis of mental disorders remained. Like most SVP's, defendant was no longer acting out sexually in custody. But he nonetheless still suffered from a mental disorder that made him a danger to the health and safety of others.

3. *Risk of Reoffending*

In evaluating whether it was likely that defendant would engage in sexually violent behavior, both Drs. Vognsen and Starr used the "Static 99" test. The Static 99 is the most widely used actuarial tool to predict the risk that a sex offender will reoffend. Studies suggest that it has "moderate predictive accuracy." The examiner attributes a numerical score to various historical (static) factors related to the offender's sex offenses, other criminal history, and sexual deviancy. The total score results in a classification within four risk categories.

In applying the Static 99 to defendant, Drs. Vognsen and Starr gave defendant a score of 8, which put him in the high risk category – a category that applies to anyone with a score greater than 6. In that category, according to studies, defendant had a 39 percent chance of being convicted of a new violent sexual offense within five years of release, a 45 percent chance within ten years of release, and a 52 percent chance within 15 years.

Dr. Vognsen noted, however, that defendant was currently 51 years of age. At least one study suggested that for persons in the age group 50 to 59.9, the score

defendant achieved would result in about a 25 percent change of being convicted of a new sexual offense within five years of release. Even so, in Dr. Vognsen's opinion, that risk was significant.

To confirm the accuracy of the Static 99 results, Dr. Vognsen also used three other predictive tools, each of which relies on a different basis of prediction: the Rapid Risk Assessment of Sex Offender Recidivism (RRASOR), the Sex Offender Risk Appraisal Guide (SORAG), and the MSOSTR. These three tools corroborated the results of the Static 99 in predicting the risk of defendant reoffending.

As a method of determining whether the Static 99 and the other tools were accurate, Dr. Vognsen looked at other factors "to get a fix . . . from a more clinical common sense personality perspective." These factors overwhelmingly supported the results of the Static 99 and other tests. For instance, Dr. Vognsen found evidence of a risk of reoffending in defendant's report that when he was 16 he was sexually involved with a 12-year-old female cousin, in his failure in sex offender treatment at Patton, in his lack of any stable employment history before incarceration, and in his failure to pursue any vocational path in custody.

Because studies suggest that psychopathy increases the chance that sexual deviancy will be acted upon, Dr. Vognsen also used the HARE Psychopathy Checklist Revised. In that test, defendant scored 26 out of a possible 40. A score greater than 25, though not definitive evidence of psychopathy, has been shown to be a predictor of sexual recidivism. Dr. Vognsen described defendant as "right across the border line, not a complete psychopath, but there is enough that there is a concern in that area too."

Dr. Vognsen also examined "stable" factors that might change slowly and other "acute" factors that might change daily. He concluded that defendant had "intimacy deficits." He had had only two intimate relationships in his life. One

was the relationship with his girlfriend, about which he had bad feelings, that ended shortly before the 1981 offenses. The other was one in which an older man sexually exploited defendant when defendant was 20 years old. Although defendant's ability to control his behavior seemed to be improving, he had a history of more than 40 serious rules violations while in custody. It appeared that the only positive social influence defendant might have out of prison is his sister.

In Dr. Vognsen's opinion, defendant still had the urge towards sexually violent behavior against women. "If he comes out and finds himself unhappy, [in] unpleasant circumstances again like when he broke up with his woman friend, he would be again in a state that would compel him toward, not just . . . exhibitionism but sexually violent . . . offenses."

Similarly, Dr. Starr found no factors that would mitigate the risk of defendant committing another violent sex offense. Defendant's age might lessen the risk, but in the community some of defendant's sexual outlet would likely be nonconsensual. In custody, he had little opportunity to do more than touch female staff. But when released into the community, given his mental disorders, "he could start engaging again in these kinds of nonconsensual violent [sexual] behaviors." Dr. Starr believed that it was likely that defendant would reoffend, meaning that there was a substantial or serious risk. While in custody, defendant had not availed himself of sexual offender treatment, the most important treatment available for his conditions. He also had not dealt with his impulse control problems. He had no real understanding of his deviant urges or of the possibility he might reoffend, and had no plan to prevent reoffending if released to the community.

4. *Amenability to Treatment*

Dr. Vognsen did not consider defendant amenable to treatment in the community. Defendant did not consider himself a sex offender and did not believe

that he needed treatment. Defendant believed that he had treated himself and was not a risk. Defendant said that his defense team would arrange free counseling for him with a Dr. Anderson in Orange County. But Dr. Vognsen believed it unlikely defendant would accept such treatment, because he did not believe that he was a sex offender. Moreover, although defendant acknowledged the harm he caused to his victims, he never took responsibility for the crimes. He blamed his offenses on alcohol, drugs, poor upbringing, and other factors. But he has never acknowledged that he is "the man who did this and . . . could do it again . . . if [he did not] watch out." In Dr. Vognsen's opinion, the only viable way in which defendant might receive treatment is in a secure facility.

B. *Defense*

1. *Dr. Arthur Kowell*

Dr. Arthur Kowell, a neurologist, examined defendant and performed neurological testing in July 1999 and October 2000. Consistent with defendant's report of a head injury in 1979, Dr. Kowell found temporal lobe dysfunction. Someone suffering from such a condition can exhibit a lack of impulse control, hypersexuality, abnormal sexual behavior, and depression or anxiety. Dr. Kowell believed that defendant's brain trauma contributed to his aberrant sexual behavior, including his commission of the qualifying offenses. Although defendant's brain damage would never get better, it might be treated with medication and counseling, which can achieve varying degrees of success depending on the patient. If defendant's behavior was not controlled by medication and counseling, "there would be no reason not to think that he could certainly have the abnormal behaviors in the future."

Dr. Kowell's conclusions concerning defendant's brain injury did not mean that defendant did not suffer from paraphilia. On that point, Dr. Kowell deferred to

the psychologists. Further, he agreed that his conclusion that defendant may have impulse control problems "is just another way of saying that he has a mental disorder."

2. *Laura Costilow*

Defendant's sister, Laura Costilow, testified that defendant was physically and emotionally abused by their father, and also possibly sexually abused. Currently, she and her husband were willing to have defendant live with them at their home in Texas. Her husband had arranged a job for defendant at the company where he worked. Ms. Costilow had also found AA and NA meetings near her home, and had made arrangements for defendant to attend anger management counseling. Defendant had told her that he was willing to attend substance abuse meetings and therapy, and was willing to take medication.

DISCUSSION

Defendant contends that the evidence failed to prove that he suffered from a mental disorder that made him a danger to the health and safety of others *at the time of commitment.* Rather, because the last incident of exhibitionism or masturbation occurred in 1999, the evidence showed that he was able to control his behavior and unlikely to be a danger.

We find substantial evidence supports the jury's verdict that defendant is an SVP. Of course, in determining whether substantial evidence supports the judgment, we review the entire record in the light most favorable to the judgment, drawing all reasonable inferences in support. (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 352 (*Sumahit*).)

Our Supreme Court has held that the term "likely," for purposes of determining whether it is likely a defendant will commit predatory, violent sexual

offenses in the future "connotes much more than the mere *possibility* that the person will reoffend as a result of a predisposing mental disorder that seriously impairs volitional control. On the other hand, the statute does not require a precise determination that the chance of reoffense is *better than even*. Instead, an evaluator applying this standard must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 922; see *People v. Roberge* (2003) 29 Cal.4th 979, 988-989 [jury must be instructed that SVP statute requires proof that person "poses a substantial danger, that is, a serious and well-founded risk, of committing a sexually violent predatory crime if released from custody"]; see also *People v. Williams* (2003) 31 Cal.4th 757, 777 (*Williams*) [because SVP finding under statutory language necessarily encompasses a finding of serious difficulty in controlling sexual violence, no separate instruction or finding on that issue is required to satisfy due process].)

Contrary to the implicit assumption in defendant's contention, however, a showing that an offender suffers from a current mental disorder that makes it difficult or impossible to restrain violent sexual behavior does not require that the person "presently engage[s] in overt manifestations of a sexually violent predator." (*Sumahit, supra*, 128 Cal.App.4th at p. 353; see also § 6600, subds. (d) & (f).)[6]

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[6] Section 6600, subdivision (d), provides: "'Danger to the health and safety of others' does not require proof of a recent overt act while the offender is in custody." Subdivision (f) provides: "'Recent overt act' means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior."

Rather, because during incarceration an offender may not be subject to the same stimuli as in the community, "his lack of outward signs of sexual deviance is not dispositive of whether he is likely to reoffend if released into society at large. Such an assessment must include consideration of his past behavior, his attitude toward treatment and other risk factors applicable to the facts of his case." (*Sumahit, supra*, 128 Cal.App.4th at p. 353 [involving pedophile who, while in custody, lacked access to children].)

In the instant case, as explained by Drs. Vognsen and Starr, defendant's past behavior, his attitude toward treatment, and other risk factors created a substantial, continuing risk that defendant would commit a violent, predatory sexual offense if released.

Both psychologists diagnosed defendant as suffering from two primary mental disorders: paraphilia n.o.s. and personality change due to brain injury. Both conditions are characterized by a serious deficit in the ability to control violent sexual impulses. Indeed, even defendant's neurological expert, Dr. Kowell, testified that defendant's brain injury was characterized by a lack of impulse control, and that in the absence of defendant submitting to appropriate medication and counseling, "there would be no reason not to think that he could certainly have the abnormal behaviors in the future." Drs. Vognsen and Starr believed it unlikely defendant would make the effort to receive adequate treatment if released from custody. Defendant did not believe he was a sex offender, did not believe he needed sex offender treatment, and refused to participate in such treatment while in custody. As a result, as Dr. Starr noted, defendant had no real understanding of his deviant urges and no plan to prevent reoffending if released into the community. To the extent, through the testimony of his sister, defendant presented evidence of his willingness to accept medication and treatment if released, the jury could reasonably disbelieve that evidence.

The Static 99 is a commonly accepted actuarial tool in predicting the likelihood that a violent sex offender will reoffend. (See *People v. Therrian* (2003) 113 Cal.App.4th 609, 614-616 [Static 99 is not subject to *Kelley/Frye* rule, because the ultimate expert opinion on dangerousness rests of a variety factors]; see also *People v. Poe* (1999) 74 Cal.App.4th 826, 831-832 [use of RRASOR scale and consideration of other risk factors constituted substantial evidence of likelihood defendant would reoffend].) Drs. Vognsen and Starr both used the Static 99 to evaluate the risk of defendant committing a predatory sexually violent offense if released, and found him to be in the high risk category. According to Dr. Vognsen, studies suggested that high risk offenders had a 39 percent chance of being convicted of a new violent sexual offense within five years of release, a 45 percent chance within ten years of release, and a 52 percent chance within 15 years. One study suggested that for persons in defendant's age group (50 to 59.9; defendant was 51), a high risk offender would have about a 25 percent chance of being convicted of a new sexual offense within five years of release. Even so, in Dr. Vognsen's opinion, that risk was significant.

Dr. Vognsen found that other evaluation tools – the RRASOR, SORAG, and MSOSTR – corroborated the results of the Static 99, as did other risk factors such as defendant's score on the HARE Psychopathy Checklist Revised, his intimacy deficits, and his lack of any vocational training while incarcerated.

In Dr. Vognsen's opinion, defendant still had the urge towards sexually violent behavior against women: "If he comes out and finds himself unhappy, [in] unpleasant circumstances again like when he broke up with his woman friend, he would be again in a state that would compel him toward, not just . . . exhibitionism but sexually violent . . . offenses." Similarly, Dr. Starr found no factors that would mitigate the risk of defendant committing another violent sex offense. Defendant's

age might lessen the risk, but in the community some of defendant's sexual outlet would likely be with nonconsenting women.

Although there was no evidence that defendant had acted out sexually in custody since 1999, that factor did not mean that defendant had ceased to be a danger. As Drs. Vognsen and Starr explained, since 2002 defendant had been confined in state hospitals, where the environment did not present the same stimuli as prison or society at large. Moreover, he had made recent comments which reasonably counseled concern for his behavior if released from custody. In June 2005, he told a female psychiatric technician that he had "a special place" in his heart for her based on having made eye contact with her when he first got in the unit, and he hoped that when he was released they "could have something together." In September 2005, he told another female psychiatric technician that he had "tried really hard not to stare at [her] all day." Also in 2005, when discussing with Dr. Vognsen his previous acts of exhibitionism and masturbation in front of female staff members, he stated his current belief that some women liked observing such conduct. He claimed that female staff members would bend over and open their legs at him.

Defendant surveys other decisions and concludes that his "improved control contrasts with the cases" in which the offender did not cease to act out sexually. That an offender continues to act out in custody is certainly a strong indicator of serious difficulty in controlling sexual violence, but it is not required to classify the offender as an SVP. What is required, rather, is a rational evidentiary basis from which the finder of fact can conclude that the offender's "capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired." (*Williams, supra,* 31 Cal.4th at pp. 776-777.) In the instant case, the evidence undoubtedly provided a firm basis to find that defendant's capacity to control his

violent sexual tendencies would be seriously impaired if released into the community.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.